

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Supreme Court Case No. 20170455  
Consolidated Dickey County District Court No.'s  
11-2016-DM-00026 and 11-2016-CV-00068

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Orwig's Livestock Supplements, Inc.,  
Orwigs Tubs International Inc.,  
and MVP Transport, Inc.

Plaintiffs/Appellees,

v.

*Mary*  
~~Marcy~~ C. "Marcy" Orwig,

Defendant/Third-Party Plaintiff/Appellant,

v.

Steven Orwig,

Third-Party Defendant/Appellee

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**BRIEF OF PLAINTIFFS/APPELLEES ORWIG'S LIVESTOCK SUPPLEMENTS,  
INC., ORWIGS TUBS INTERNATIONAL INC, AND MVP TRANSPORT, INC.**

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**APPEAL FROM: (1) AN ORDER FINDING MARY C. ORWIG IN CONTEMPT OF  
COURT ENTERED JULY 31, 2017; (2) AN ORDER GRANTING STEVEN  
ORWIG'S MOTION FOR CONTEMPT OF COURT AND MOTION FOR EX  
PARTE INTERIM ORDER ENTERED SEPTEMBER 1, 2017; (3) AN ORDER  
FINDING MARY C. ORWIG IN CONTEMPT OF COURT ENTERED OCTOBER  
9, 2017; (4) AN ORDER FINDING MARY C. ORWIG IN CONTEMPT OF COURT  
ENTERED NOVEMBER 13, 2017; (5) AN ORDER DENYING MARY C. ORWIG'S  
MOTION TO VACATE CONTEMPT ORDER ENTERED DECEMBER 8, 2017**

**FROM THE DISTRICT COURT FOR THE SOUTHEAST JUDICIAL DISTRICT  
DICKEY COUNTY, NORTH DAKOTA  
THE HONORABLE CHERIE L. CLARK**

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## **STATEMENT OF THE ISSUES**

1. Does this Court lack jurisdiction over this appeal as it relates to the Corporations?
2. Did the District Court err when it declined to vacate the July 31, 2017 and October 9, 2017 Contempt Orders?
3. Does the relief afforded the Corporations survive irrespective of the Contempt Orders?

## STATEMENT OF THE CASE

¶1 This is an appeal from the December 18, 2017 Order of the District Court, Southeast Judicial District, Dickey County, denying Appellant Mary Caroline Orwig's ("Marcy") Motion to Vacate the District Court's Contempt Orders dated July 31, 2017, October 9, 2017, and November 13, 2017.<sup>1</sup> Appellant's A. at 221. Appellees Orwig's Livestock Supplements, Inc., Orwigs Tubs International Inc., and MVP Transport, Inc. (collectively, the "Corporations") are North Dakota Business Corporations principally located in Ellendale, North Dakota. Marcy is a 50% Shareholder in the Corporations. The other 50% owner and sole Officer/Director is Appellee Steven Orwig ("Steve"). Steve and Marcy are husband and wife.

¶2 In response to Marcy's breach of her fiduciary and statutory duties, the Corporations commenced an action via Summons and Complaint on August 23, 2016 requesting *inter alia* a temporary restraining order and preliminary injunction enjoining Marcy from transacting with the Corporations' property or entering into any further transactions for or on behalf of the Corporations; an accounting and return of all funds/property wrongfully converted, misappropriated or utilized for Marcy's personal benefit; and the removal of Marcy as a Director/Officer of the Corporations pursuant to N.D. Cent. Code Chapter § 10-19.1-41. Appellant's A. at 8. Marcy Answered, Counterclaimed, and served a Third-Party Summons and

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<sup>1</sup> Appellant also appeals directly from the July 31, 2017, September 1, 2017, October 9, 2017, and the November 13, 2017 Orders of the District Court. Appellant's A. at 221. The Corporations dispute the timeliness of the appeal from the July 31, 2017, and October 9, 2017 Orders.

Complaint on Steve alleging various violations of N.D. Cent. Code Chapter § 10-19.1. Appellant's A. at 15.

[¶3] The District Court granted the Corporations a Temporary Restraining Order on September 15, 2016 and a Preliminary Injunction on October 31, 2016, affording the requested relief set forth above. Appellant's A. at 23, 66. The Preliminary Injunction Order was to remain in effect during the pendency of the proceeding, or the expiration of the period prescribed by N.D. R. Civ. P. 65(e), whichever occurred first.

[¶4] Concurrently, a divorce action between Marcy and Steve was commenced styled Steven Mark Orwig v. Mary Caroline Orwig, Case No. 11-2016-DM-00026 (Dickey County) (Honorable John E. Greenwood). Appellant's A. at 227. By virtue of Marcy and Steve's sole ownership of the Corporations at issue, there existed a significant overlap between the Divorce and Corporate actions. The actions were consolidated on June 8, 2017. Appellant's A. at 114.

[¶5] Steve and Marcy are owners via Deed of Trust of a ranch located at 2440 East Sherry Lane, San Tan Valley, Arizona 85140 (hereinafter the "Arizona property") which is an asset of great value to the parties. Appellant's A. at 252. In the face of a balloon payment of \$730,000.00 for the property which Steve and Marcy could not afford, the District Court ordered the property be sold. Appellant's A. at 134.

[¶6] Throughout this action, Marcy has been found in contempt for violating the District Court's Orders that she return corporate property and for the sale of the Arizona property. As a result, the District Court ordered remedial sanctions to include a period of incarceration and an award of attorneys' fees. Appellant's A.



at 308. Collateral to its contempt findings, the District Court found good cause to extend the preliminary injunction throughout the pendency of these consolidated actions, and approved a receiver over the Arizona property to effectuate its sale. Appellant's A. at 134, 163.

[¶7] On November 17, 2017, Marcy interposed a Motion to Vacate Contempt Orders. Appellant's A. at 196. The District Court denied Marcy's Motion via Order dated December 18, 2017. Appellant's A. at 173. Notice of Appeal was filed on December 20, 2017. Appellant's A. at 221.

## **STATEMENT OF THE FACTS**

[¶8] In a previous action styled Orwig's Livestock Supplements, Inc. et al. v. Mary C. "Marcy" Orwig, Civil No. 11-2014-CV-00048, the District Court found Marcy had engaged in numerous transactions whereby she spent hundreds of thousands of dollars of corporate funds on non-corporate matters. These expenditures were unauthorized, clearly for Marcy's personal benefit, and served no corporate purpose. As a result, the District Court enjoined Marcy from accessing the Corporations' accounts or otherwise expending any sums for or on the Corporations' behalf, and required Marcy to account to Corporations for the property she had stolen. The District Court subsequently held Marcy in contempt for her failure to abide by its Orders. Appellant's A. at 8.

[¶9] The above-referenced prior action was dismissed without prejudice. Since the dismissal, Marcy has made no recompense whatsoever to the Corporations of monies/properties she has stolen or the other damage she inflicted upon their businesses. To the contrary, since the dismissal of the prior action, Marcy's deleterious actions toward the Corporations began anew, to wit:

- Marcy ordered credit cards under the names of the Corporations with huge credit limits, and began transacting with those credit cards for personal use;
- Marcy attempted to access the Corporations' bank accounts and lines of credit;
- Marcy transferred from the Corporations' accounts to her personal account some \$4,150.00, for personal use;
- On those occasions when Marcy was on Corporations' premises, she was disruptive of their businesses and verbally abusive to their employees.

Appellant's A. at 8.

[¶10] Based on the foregoing conduct, the Corporations commenced an action against Marcy on August 23, 2016, whereby they requested, *inter alia* a temporary restraining order and preliminary injunction enjoining Marcy from transacting with the Corporations' property or entering into any further transactions for or on behalf of the Corporations; an accounting and return of all funds/property wrongfully converted, misappropriated or utilized for Marcy's personal benefit; and the removal of Marcy as a Director/Officer of the Corporations pursuant to N.D. Cent. Code Chapter § 10-19.1-41. Appellant's A. at 8.

[¶11] On September 7, 2016, the Corporations filed a motion for temporary restraining order and preliminary injunction whereby they sought to enjoin Marcy as follows:

1. from transacting in any credit, funds or property of the Corporations including but not limited to bank accounts, credit cards, charge or store accounts, etc.;
2. from transacting any business for or on behalf of any of the above-named Corporations;
3. from being on the premises of the Corporations;
4. from accessing or attempting to access the Corporations' property, including its computer system;
5. from taking any action vis-à-vis the Corporations' employees, including but not limited to purporting to terminate their employment or any other adverse employment action; and
6. removing Marcy as an Officer/Director of the Corporations pending a final determination on the merits.

[Doc ID#'s 7-16].

[¶12] On September 12, 2016, Marcy, represented by Attorney Erica Chisholm, filed and served a Brief in Opposition to the Corporations' Motion for Temporary

Restraining Order/Preliminary Injunction. [Doc ID#'s 24-38]. The District Court granted the Corporations a Temporary Restraining Order on September 15, 2016. Appellant's A. at 22.

[¶13] On September 15, 2016, Marcy filed and served her Answer to the Corporations Complaint, included a Counterclaim against the Corporations, and served a Third-Party Summons and Complaint on Steve alleging various violations of N.D. Cent. Code Chapter § 10-19.1. Appellant's A. at 15.

[¶14] Shortly after, the Corporations filed a Motion for Return of Corporate Property. In her return to the motion dated October 19, 2016, Marcy admitted to possessing certain corporate items, denied possession of others, and disputed claims of corporate ownership to certain vehicles in her possession. Appellant's A. at 54.

[¶15] A duly noticed hearing was held on October 10, 2016, on the Corporations' Motion for Preliminary Injunction. Each party was present, either in person or telephonically, and represented by Counsel. The District Court granted the Corporations' Motion for Preliminary Injunction affording them the same relief granted in the Temporary Restraining Order dated September 15, 2016. The October 31, 2016 Preliminary Injunction Order was to remain in effect during the pendency of the proceeding, or the expiration of the period prescribed by N.D. R. Civ. P. 65(e), whichever occurred first. Appellant's A. at 66.

[¶16] On November 30, 2016, the Corporations noticed a telephonic hearing for December 8, 2016, at which the Corporations' Motion for Return of Corporate Property would be heard. Each party, represented by Counsel, appeared. The

District Court granted the Corporations' Motion on December 13, 2016. Appellant's A. at 72.

[¶17] Based on Marcy's failure to fully comply with the October 31, 2016 Order granting preliminary injunction, and the December 13, 2016 Order granting the Motion for Return of Corporate Property, the Corporations served a Motion for Contempt on each parties' Attorney on February 2, 2017. Appellant's A. at 78. As the basis for its Motion, the Corporations identified several items on the list contained in the Court's Order Granting Motion for Return of Corporate Property which had yet to be returned, along with other items clearly belonging to the Corporations or their employees. Appellant's A. at 80. Notice of hearing on the Corporations' Motion for Contempt was served on the parties' on February 21, 2017. Appellant's A. at 107. That hearing was set for April 3, 2017. However, due to an unavailable witness, the hearing was continued and Counsel were instructed to reschedule and notice a mutually agreeable hearing date. Appellees' A. 1.

[¶18] Given the clear overlap between the Corporate action and concurrent Divorce action in Case No. 11-2016-DM-00026, the Corporations moved to consolidate the two matters on April 6, 2016. Appellant's A. at 108.

[¶19] While the Motion to Consolidate was pending, the Arizona property was facing a balloon payment of \$730,000.00 that Steve and Marcy could in no way afford. Facing foreclosure, Steve, in the Divorce action, filed a Motion for Ex Parte Interim Order citing exceptional circumstances exist for the District Court to grant an interim order allowing him the authority to sell the Arizona property. Appellant's A. at 252.

[¶20] A hearing on the Motion for Ex Parte Interim Order was noticed for May 25, 2017. Appellant's A. at 262. Both Steve and Marcy were represented by Counsel at that hearing, however, due to concerns that its outcome could have implications for the Corporations, the hearing was continued until such time as a scheduling conference could be had with the parties of the Divorce action and the Corporate action to define the ownership interests of the real estate at issue in the Ex Parte Interim Order. Appellees' A. 3.

[¶21] On May 26, 2017, Judge Greenwood emailed Counsel for Marcy, Steve, and the Corporations 1) reiterating his concerns about proceeding in the Divorce action without Counsel for the Corporation present; 2) requesting the Corporations' Counsel prepare an Order granting the Motion to Consolidate; and 3) requesting the parties confer and schedule a hearing on the Corporations' outstanding Motion for Contempt and Preliminary Injunction and reschedule the hearing on Steve's Ex Parte Interim Order which had been continued in the Divorce action. Appellees' A. 7, 53.

[¶22] On May 31, 2017, a status conference was held, per Judge Greenwood's request, in which the Court again brought the parties' attention to various issues pending in the related actions. A hearing on all these issues was set for June 28, 2017. In order to remind the Court of the issues to be heard as determined at the May 31, 2017 Status Conference, Counsel for the Corporations sent correspondence to Judge Greenwood on June 23, 2017, outlining the

Corporations' position with respect to the issues it would take at the June 28, 2017 hearing.<sup>2</sup> Appellant's A. at 183.

[¶23] At the June 28, 2017 hearing, each party was present and represented by Counsel. At the onset, the District Court recognized the Motion for Contempt and other pending issues would be considered at the hearing, with no objection from Marcy as to inadequate notice, to wit:

10 The Court: This is District Court for  
11 Dickey County as indicated. Today is June 28, 2017,  
12 time is 9:30 a.m. Court is taking up two matters.  
13 They are file No. 11-2016-DM-26, Steven Orwig vs. Mary  
14 Orwig, and 11-2016-CV-68, Orwig Supplements, Inc.;  
15 Orwigs Tubs International Inc.; MVP Transport Inc. vs.  
16 Mary C. Orwig.  
17 Ms. Orwig is present in court and represented by  
18 Erica Chisholm, Attorney at law.

[ . . . ]

24 The court has several matters today. The motion  
25 in the divorce action is for an interim order.  
1 There's also the motion - - the cross motion there.  
2 And in the other matter, the civil action, there is a  
3 motion for contempt. Are the parties ready to proceed  
4 here today?

[ . . . ]

8 Ms. Chisholm: Yes, your Honor.

Appellees' A. 4-5.

[¶24] Additionally, it was well understood by the parties, including Marcy, that the Preliminary Injunction would also be considered at the June 28, 2017 hearing, to wit:

9 **The Court: Yes. And I don't think we**  
10 **necessarily have to compartmentalize in separate mini**

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<sup>2</sup> Contrary to Marcy's claim, the Corporations do not argue their June 23, 2017 letter should be construed as a Notice of Hearing to Marcy. However, it confirms that all parties—including Marcy through her Attorney—had actual notice and understanding of the ongoing proceedings and issues which needed to be addressed at the upcoming hearing.

11 hearings. I guess the issues are all interrelated,  
12 and I raised the issue in an email to counsel  
13 about the trial and the preliminary injunction. But  
14 the parties are more or less in agreement that it is  
15 intertwined with the divorce action, and there's no  
16 rush to separately try that matter.

[ . . . ]

20 The Court: Ms. Chisholm?

21 Ms. Chisholm: I do agree with that; they are  
22 interrelated.

Appellees' A. 7.

[¶25] In Support of the Corporations' Motion for Contempt for Marcy's failure to comply with the Order for Return of Corporate Property dated December 13, 2016, General Manager of Orwigs Tubs International Inc., Kathryn Peterson ("Peterson") testified to the following missing property:

7 [ . . . ] What's still missing that the companies need returned?

8 A. Well, all of these items on the list are  
9 still missing. The most important things would be the  
10 hard drive and the DVR, the Scheels credit card  
11 binders, the IRS binders, the 1099s and the W2s. The  
12 login and password for the website.

13 Q. And why - - without spending too much time,  
14 why don't you tell the Court why each of these items  
15 matter to the companies. Why their return matters.

16 A. Well, for starters we are going through an  
17 IRS audit, and they need all of these documents.

[ . . . ]

3 Q. Okay. Go on.

4 A. The website login and password for the New  
5 Concept Nutrition Website.

[ . . . ]

14 Q. Go on.

15 A. The hard drive for the DVR. If that were  
16 returned, we would be able to see where all the  
17 missing pieces went.

[ . . . ]

1 A. Just the DVR was found.

Appellees' A. 9-10.



[¶26] In support of the Corporations' request to extend the time in which a trial must be held on the Preliminary Injunction, pursuant to N.D. R. Civ. P. 65(e), Peterson testified to Marcy's deleterious actions towards the Corporations and the precarious position they are in as a result, to wit:

17 Q. Now, have you, on behalf of the companies,  
18 kept track of the funds, monies, et cetera, that Ms. Orwig  
19 has taken or diverted from the companies?

20 A. Yes.

[ . . . ]

25 Q. What is the amount of that note receivable  
1 sitting here today to your recollection?

2 A. Approximately 455,000.

3 Q. What does that consist of for the Court?

4 A. A couple of loads of tubs that were sent down to  
5 Arizona, and Marcy said she would be the Arizona  
6 distributor. We did not see a dime from the tubs.  
7 \$80,000 of it was, I believe, personal items for the  
8 house in Arizona. The rest of it is like, \$105,000  
9 she took out of her bank account. 60 to \$70,000 of  
10 furniture for the Arizona house and other  
11 miscellaneous items. She was making personal credit  
12 card payments out of the company accounts.

[ . . . ]

18 Q. Since the Court imposed the restrictions it  
19 imposed on Ms. Orwig's ability to transact business  
20 with the company assets, company bank accounts, has that  
21 stopped this conduct in large part?

22 A. Yes.

23 Q. Okay. If that conduct were to reoccur, what  
24 would happen to the businesses?

25 A. Well, we have been informed by bankers that  
1 if Marcy has anything to do with the company, they  
2 will quit doing business with us.

[ . . . ]

1 Q. And so if the current restrictions that the  
2 Court has imposed stay in place, do you feel confident  
3 that we can - - an no additional substantial  
4 unforeseen expenses are incurred - - are you reasonably  
5 confident that we can stay afloat until business picks  
6 up again?

7 A. Yes.

Appellees' A. 12-14, 16.

[¶27] On cross examination, Marcy failed to provide any credible evidence or other explanation as to why the corporate property that the District Court ordered to be returned had not been returned, to wit:

- 14 Q. In fact, you admitted that you have returned  
15 some of the very property that you denied having in  
16 the first place; right? That's your testimony?  
17 A. I don't have it now. You keep saying I have  
18 this, and I don't have this.  
19 Q. But some of the property that was removed,  
20 you did have, didn't you?  
21 A. And it was returned within the time frame.  
22 Q. And so you are expecting the Court to believe  
23 that while you acknowledge taking this corporate  
24 property, you didn't take that corporate property, and  
25 you have no idea where it is?  
1 A. She can make up whatever kind of crap she  
1 wants to make up. That's pretty much what she's done  
3 since the very beginning.  
4 Q. Where is the hard drive for the security  
5 system, Ms. Orwig? Where is it?  
6 A. I have no clue.  
7 Q. But you returned the box?  
8 A. Where is the DVR?  
9 Q. You returned it.  
10 A. Where is the DVR? No, I didn't return it. I  
11 left it in a shed for them to go get it.

Appellees' A. 17-18.

[¶28] As a result, the Corporations requested the District Court find Marcy in contempt for her failure to return corporate property. Importantly, the Corporations **did not** ask for a contempt sanction. Instead, the Corporations argued Marcy's violation of the District Court's Order compelling her to return corporate property constituted good cause to extend the preliminary injunction under N.D. R. Civ. P. 65(e). Appellees' A. 22-24. Although the Corporations took no position relative to Steve's Motion for Ex Parte Interim Relief, the Corporations did support the sale of

the Arizona property insofar as Steve and Marcy's personal financial health impacted the Corporations. Appellees' A. 30-32. Via Order dated July 31, 2017, the Court solemnized its rulings granting the Corporations' Motion for Contempt and Steve's Motion for Ex Parte Interim Order. Appellant's A. at 134. Additionally, the District Court found good cause pursuant to N.D. R. Civ. P. 65(e) to extend the Preliminary Injunction for the pendency of the consolidated actions. Notice of Entry of this Order was filed and served on August 15, 2017. Appellant's A. at 139.

[¶29] With the good cause extension of the Preliminary Injunction firmly in place, the Corporations no longer anticipated taking an active role in the litigation, as the remaining issues would likely be resolved via the consolidated divorce proceeding. See Grinaker v. Grinaker, 553 N.W.2d 200 (N.D. 1996) (waste of judicial resources when wife who was involved in divorce initiated separate actions for equitable relief, seeking to protect her half interest in corporation owned by husband and wife; proper procedure was to seek relief as part of pending divorce action). However, Marcy's continued contempt of the District Court's Order required additional appearances, at great expense to the Corporations.

[¶30] A Scheduling Conference was set by request of newly assigned Judge, the Honorable Cherie Clark, for September 28, 2017. Notice of Hearing was served on the parties on September 5, 2017. Appellant's A. at 147. Attorney Chisholm appeared telephonically on behalf of Marcy, who was not initially present. In response to the District Court's inquiry regarding the sale of the Arizona property, Attorney Chisholm stated the following:

14 Ms. Chisholm: I assume the problem  
15 that the parties are having, your Honor, is that **my**  
16 **client is prohibiting access to the ranch with respect**



[ . . . ]  
19 The Court: Okay. Well, for today's  
20 purposes, I'm finding you in contempt for not  
21 complying with the prior Court order

[ . . . ]  
1 The Court: **I'm ordering you to comply with  
2 the sale of your house, to allow a realtor onto the  
3 property. If you do not do so willingly, I'm  
4 authorizing or ordering the Maricopa Sheriff's  
5 Department to help the realtor do so. I'm ordering  
6 that we have a hearing in three weeks to make sure  
7 that's done. If that has not been done, we will  
8 consider further sanctions including but not limited  
9 to default or jail time in three weeks, ma'am.**

Appellees' A. 42-44.

[¶32] At no point during this hearing was Marcy subject to any contempt sanctions which would result in a loss of liberty, and her ability to avoid sanction was clearly predicated upon her compliance with the District Court's directives. Appellees' A. 44. Judge Clark's oral Order was confirmed via written Order dated October 9, 2017. Appellant's A. at 154. Pursuant to Judge Clark's request at the prior hearing, a Status Conference was set for October 19, 2017 for the purpose of gauging Marcy's compliance with the July 31, 2017 Order. Appellees' A. 44. Notice of hearing was mailed to Marcy on October 10, 2017 at the address she provided in open Court. Appellant's A. at 156.

[¶33] Despite being notified on the record and having notice of hearing served upon her, Marcy failed to appear at the October 19, 2017 hearing. At the hearing, Steve's personal Attorney conveyed his understanding Marcy was continuing to thwart the realtor's efforts to list the Arizona property. Appellees' A. 45-46. In response to Marcy's continuing contempt, Steve's Attorney requested a receiver be appointed to oversee the sale of the Arizona property, and proposed a period

of incarceration as a remedial sanction. The Corporations joined the request for a receiver, but not the request for incarceration. Appellees' A. 50. Briefs were submitted on the issues in accordance with the District Court's request. Doc ID #'s 176, 177, 179.

[¶34] Via its Order dated November 13, 2017 the District Court found Marcy in contempt of the October 9, 2017 Order. In support of its Order imposing the remedial sanctions of imprisonment and awarding attorneys fees, the District Court concluded:

[¶9] In the case at hand, Marcy has been found in contempt on two separate occasions. Marcy continues to intentionally disregard Orders of the Court. She has refused to facilitate the sale of the parties' Arizona property, **and expresses an intention not to sell the property**. In addition, Marcy refuses to allow the parties' realtor, Kim Williamson, to enter the property. Consequently, Marcy is in contempt of Court for intentionally disobeying an Order of the Court under N.D.C.C. § 27-10-1.1(1)(c). Furthermore, it is apparent certain remedial sanctions have not had an effect on Marcy's behavior. Therefore, the Court deems it necessary to impose the remedial sanction of imprisonment under N.D.C.C. § 27-10-01.4(1)(b), for a duration of six (6) months or until Marcy complies with the Order dated October 9, 2017, whichever is shorter. The Court believes such time will be effectual to terminate the continuing contempt, especially in consideration of the other directives entered by the Court in this Order.

In addition, Marcy shall be responsible for the opposing parties' attorney's fees pursuant to N.D.C.C. § 27-10-01.4(1)(a). The opposing parties should not have to bear the financial burden for Marcy's continued contempt. Marcy has consistently and clearly engaged in willful disobedience, which has led to additional hearings and increased filings in this matter.

[¶35] In support of its Order appointing a receiver to manage the sale of the Arizona property the District Court concluded;

Here the appointment of a receiver is appropriate because the property is "in danger of being lost, removed, or materially injured." N.D.C.C. § 32-10-01(1). Specifically, if the balloon payment on

December 17, 2017 is not made, a foreclosure will occur. Marcy has not taken any action to facilitate the sale of the property and has expressed an intention not to sell the property. Further, Marcy refuses to allow the parties' realtor, Kim Williamson, to enter the property, thereby stymieing the sale process. Therefore, judicial intervention by means of a receivership appointment is necessary to salvage the parties' interest in the property, and enable the conveyance of the property.

Appellant's A. at 163. Notice of Entry of Order was served on November 13, 2017.

Appellant's A. at 171.

[¶36] On November 17, 2017, newly retained Counsel for Marcy interposed a Motion to Vacate Contempt Orders, challenging the July 31, 2017 Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, the September 1, 2017 Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order; the October 9, 2017 Order holding Marcy in contempt for her failure to comply with the July 31, 2017 Order, and the November 13, 2017 Order imposing remedial sanctions for Marcy's contempt of the October 9, 2017 Order. Appellant's A. at 196.

[¶37] On November 28, 2017, the District Court signed a civil Bench Warrant which commanded Marcy's arrest for a period of six months, or until compliance with the Court's Order dated October 9, 2017 is achieved. Appellant's A. at 199. A status conference was held on December 13, 2017 in which a trial date was agreed upon.

[¶38] After extensively reviewing the entire record, including listening to the recording of the June 28, 2017 hearing before Judge Greenwood, the District Court denied Marcy's Motion to Vacate via Order dated December 18, 2017. Appellant's A. at 381.

## LAW AND ARGUMENT

### **I. THE CORPORATIONS TAKE NO POSITION ON CONTEMPT SANCTIONS REQUESTED BY STEVE'S PERSONAL COUNSEL**

[¶39] Central to this appeal is Marcy's repeated and willful failure to comply with the District Court's Order that she comply with the sale of the Arizona property. The sale of the Arizona property was requested as part of Steve's Motion for Ex Parte Interim Relief in the divorce proceeding. The Corporations supported this request because Steve and Marcy's financial health and the Corporations' financial health are inextricably intertwined. However, the Corporations' primary goal in their lawsuit has been and continues to be to prevent any additional deleterious conduct towards the Corporations, and this has largely been accomplished by the District Court's injunctive relief. It is the intention of the Corporations to step away and allow the parties to settle their claims through an ultimate dissolution of their assets, which includes the Corporations themselves, via the divorce action. This is pursuant to this Court's very clear directive in Grinaker v. Grinaker, 553 N.W.2d 200 (N.D. 1996), wherein the Court declared it was a waste of judicial resources for a husband and wife to engage in a separate action over their close corporations, when the proper procedure was to seek relief as part of their pending divorce action.

[¶40] Consequently, the Corporations take no position on the November 13, 2017 Order finding Marcy in contempt and imposing remedial sanctions relative to the sale of the Arizona property. Understandably so, because the Corporations can take no position on any Order relative to the parties' marital estate. Rather, the Corporations' interests are implicated by 1) the July 31, 2017 Order granting a



good cause extension to the Preliminary Injunction, 2) the October 9, 2017 Order finding Marcy in contempt of the July 31, 2017 Order, and 3) to the extent relevant, the approval of the appointment of a receiver over the Arizona property.<sup>3</sup> As set forth below, the relief afforded the Corporations bears no legal relationship to contempt sanctions, or even contempt findings for that matter.

## **II. THE COURT LACKS JURISDICTION OVER ANY APPEAL FROM THE JULY 31, 2017 AND OCTOBER 9, 2017 ORDERS.**

### **A. Standard of Review**

[¶41] Before this Court considers the merits of an appeal, it must have jurisdiction. Dietz v. Kautzman, 2004 ND 164, ¶ 6, 686 N.W.2d 110. The time limit for filing a notice of appeal is jurisdictional, and this Court will dismiss an appeal if it concludes it does not have jurisdiction. Id.

### **B. Marcy's Appeal From The July 31, 2017 And October 9, 2017 Contempt Orders Is Untimely.**

[¶42] Under N.D. Cent. Code § 27–10–01.3(3), [a]n order or judgment finding a person guilty of contempt is a final order or judgment for purposes of appeal.” N.D. R. App. P. 4(c) requires that an appeal of a contempt order must be made within “60 days after entry of the judgment or order being appealed.” A party who fails to timely appeal a contempt order is bound by it. Negaard v. Negaard, 2005 ND 96, ¶ 11, 696 N.W.2d 498. Marcy filed her Notice of Appeal from the July 31, 2017 and October 9, 2017 Orders on December 20, 2017, well beyond the 60 day time

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<sup>3</sup> The Corporations sought the appointment of a receiver over the Arizona property in the event the Corporations could arrange financing to purchase it on Marcy and Steve's behalves. Subsequently, the Corporations were unable to arrange financing, the property is in foreclosure, and Marcy has now twice petitioned for Bankruptcy. As a result, any argument over the validity of the Order appointing a receiver is likely moot.

limit. Appellant's A. at 221. Consequently, this Court should dismiss Marcy's appeal of the July 31, 2017 and October 9, 2017 Orders.

**C. Marcy's Appeal From The July 31, 2017 Order Continuing The Preliminary Injunction Is Untimely**

[¶43] N.D. Cent. Code § 28-27-02(3) allows for an appeal from an order which modifies an injunction. The time for appeals under this chapter are governed by N.D. R. App. P. 4 and N.D. Cent. Code § 28-27-02(4). N.D. R. App. P. 4(a)(1) requires a notice of appeal to be filed with the Clerk of the Supreme Court **within 60 days from service of notice of entry** of the judgment or order being appealed. In its July 31, 2017 Order, the District Court found Marcy's failure to return corporate property served as good cause for the extension of the October 21, 2016 Order Granting Motion For Preliminary Injunction. Notice of entry of the District Court's Order granting the good cause extension was served on Marcy on August 15, 2017. Accordingly, Marcy would have to have filed her Notice of Appeal no later than October 16, 2017. To the extent a good cause extension of the preliminary injunction is an appealable "modification", Marcy's appeal thereof is untimely and should be dismissed.

**III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO VACATE THE JULY 31, 2017 AND OCTOBER 9, 2017 ORDERS**

**A. Standard Of Review**

[¶44] Marcy fails to cite any standard of review or state with any particularity the Rule of Civil Procedure via which she was seeking relief before the District Court. Instead, Marcy relies on the *ipse dixit* proposition that the District Court's Orders are simply "to be voided".

[¶45] Ordinarily, a request for relief from a final Order would be pursuant to N.D.R. Civ. P. 60. To the extent intelligible, it appears Marcy is asking this Court to apply plenary review based upon the assertion that the Orders at issue are “void”. This makes no sense, however, as it is well-settled that the determinations whether contempt has been committed and remedial sanctions are warranted lie within the sound discretion of the District Court, and its decision will not be overturned on appeal absent an abuse of discretion. Lind v. Lind, 2014 ND 70, ¶ 12, 844 N.W.2d 907 (citations omitted). Axiomatically, this same standard of review applies to Marcy’s motion to vacate. Kopp v. Kopp, 2001 ND 41, ¶ 7, 622 N.W.2d 726; Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90; Red River State Bank v. Reiersen, 533 N.W.2d 683, 688 (N.D.1995). A District Court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Kopp, 2001 ND 41 ¶ 7, 622 N.W.2d 726; Follman, 2000 ND 72, ¶ 10, 609 N.W.2d 90.

**B. Marcy Was Afforded Due Process**

[¶46] Procedural due process generally entails notice and a meaningful opportunity to be heard. Dieterle v. Dieterle, 2016 ND 36, ¶ 15, 875 N.W.2d 479. To adequately provide notice for purposes of due process, Marcy was entitled to notice reasonably calculated, under all the circumstances, to apprise her of the pendency of the action and afford her an opportunity to present her objections. Id.

**1. Marcy Had Adequate Notice The Motion For Contempt Would Be Heard At the June 28, 2017 Hearing**

[¶47] Marcy's claim she received inadequate notice that the Corporations' Motion for Contempt would be heard at the June 28, 2017 hearing misconstrues the record and leaves out a number of facts, to wit:

- On February 2, 2017, the Corporations moved the District Court for an Order finding Marcy in Contempt for failing to comply with the October 31, 2016 Preliminary Injunction and the December 13, 2016 Order Granting Return of Corporate Property. Appellant's A. at 78. The hearing, set for April 3, 2017, was continued and at the District Court's request, Counsel were instructed to reschedule and notice a mutually agreeable evidentiary hearing date. Appellant's A. at 112.
- On May 26, 2017, Judge Greenwood emailed Counsel for Marcy, Steve, and the Corporations whereby he requested the parties confer and schedule a hearing on the Corporations' outstanding Motion for Contempt and Preliminary Injunction and to reschedule the hearing on Steve's Ex Parte Interim Order which had been continued in the divorce action. Appellees' A. 53. A status conference was held May 31, 2017, per Judge Greenwood's request in which to calendar the pending issues.
- On June 9, 2017, Counsel for Steve filed a Notice of Hearing which set an Interim Hearing date of June 28, 2017. Appellant's A. at 116. In a letter to Judge Greenwood, dated June 23, 2017 [Doc ID# 149] Counsel for the Corporations reminded the District Court of the continuing outstanding issues concerning the Preliminary Injunction and Motion for Contempt, and that it was understood these issues would be addressed during the upcoming Interim Hearing. Appellant's A. at 124.
- At the June 28, 2017 hearing. Marcy was present and represented by Counsel. Witnesses were examined and cross-examined. As a result of the hearing, Marcy was found in contempt for her failure to return corporate property. At no time did Marcy object to lack of adequate notice. Appellees' A. 4-5.
- Via Order dated July 31, 2017, the Court solemnized its rulings granting Plaintiff Corporations' Motion for Contempt and Steve Orwig's Motion for Ex Parte Interim Order. Appellant's A. at 134. Notice of Entry of this Order was filed and served on August 15, 2017. Appellant's A. at 139.
- A Scheduling Conference was set by request of newly assigned Judge, Cherie Clark, for September 28, 2017. Appellant's A. at 147. At the conference, Attorney Chisholm confirmed Marcy was prohibiting the realtor from accessing the ranch. Soon after, Marcy appeared, by phone, fired her attorney, and confirmed her unwillingness to comply with the sale of the Arizona property. Appellees' A. 30, 43.

[¶48] Indeed, Marcy’s claim she was “blindsided” is further weakened by her acceptance to proceeding on the Motion for Contempt on the record on June 28, 2017, to wit:

24 The court has several matters today. The motion  
25 in the divorce action is for an interim order.  
1 There’s also the motion - - the cross motion there.  
2 And in the other matter, the civil action, there is a  
3 motion for contempt. Are the parties ready to proceed  
4 here today?  
[ . . . ]  
8 Ms. Chisholm: Yes, your Honor.

Appellees’ A. 4, 5.

[¶49] Against that backdrop, it is clear Marcy had ample notice and opportunity to respond to the Corporations’ Motion for Contempt.

**2. Marcy’s Statements At The September 28, 2017 Hearing Constituted Direct Contempt.**

[¶50] “Intentional, willful and inexcusable disobedience of a court order constitutes contempt of court under N.D.C.C. § 27–10–01.1(1)(c).” Holkesvig v. Welte, 2012 ND 14, ¶ 9, 809 N.W.2d 323. A District Court has the power to adjudicate contempt **that occurs in its actual presence**. State v. Goeller, 263 N.W.2d 135, 137 (N.D. 1978). Marcy’s “astonishment” with how a noticed scheduling conference could result in a contempt order ignores the record leading up to the District Court’s Order. Attorney Chisholm confirmed Marcy was prohibiting the realtor from accessing the ranch. Appellees’ A. 30. When directly confronted with this information, Marcy confirmed, “I do not want to sell my home . . . and I do not feel it is necessary to sell this property”). Appellees’ A. 43. Marcy’s statement was an admission of Contempt made in open Court. As such, the District Court was well within its authority and ability to enforce its own Order. See

Baier v. Hampton, 417 N.W.2d 801, 805–06 (N.D. 1987) (holding admission of contempt in presence of court may be punished summarily).

[¶51] In light of the foregoing, this Court should affirm the District Court's Order denying Marcy's motion to vacate the July 31, 2017 and October 9, 2017 Orders for Contempt.

#### **IV. THE RELIEF AFFORDED THE CORPORATIONS SHOULD NOT BE DISTURBED**

[¶52] In the event any Contempt Orders are vacated, this should not affect the primary relief which has been afforded the Corporations; namely, the good cause extension of the preliminary injunction and approval of a receiver.

##### **A. Issues Not Raised In The District Court May Not Be Raised For The First Time On Appeal.**

[¶53] This Court is well aware that the purpose of an appeal is to review the actions of the Trial Court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories. Paulson v. Paulson, 2011 ND 159, ¶ 9, 801 N.W.2d 746 (citations omitted). Certainly, it is axiomatic that issues not raised in the District Court may not be raised for the first time on appeal. PHI Fin. Servs. v. Johnston Law Office, P.C., 2016 ND 114, 881 N.W.2d 216, reh'g denied (July 28, 2016); Rath v. Rath, 2017 ND 138, ¶ 16, 895 N.W.2d 315; Paulson v. Paulson, 2011 ND 159, ¶ 9, 801 N.W.2d 746.

[¶54] On July 31, 2017, the Corporations received a good cause extension of their October 21, 2016 Preliminary Injunction for the pendency of the lawsuit. On November 17, 2017, Marcy served her Motion to Vacate Contempt Orders. Specifically, Marcy moved “that any contempt orders in the above-entitled action be vacated . . . “. Appellant's A. at 328. Marcy did not request to vacate any orders

of the District Court contained in the July 31, 2017 Order beyond the Order for Contempt. Indeed, Marcy outright confirmed as much, to wit:

Corporations seek to muddy the waters when they argue the legal basis for the “primary relief” which has been afforded to plaintiff corporations.” **Marcy only attempts to eliminate untimely, and unjustified contempt orders . . . never once has the Garaas Law Firm acted on behalf of Marcy to eliminate the “Preliminary Injunction”, apparently issued under N.D. R. Civ. P. 65, and obviously not under N.D.C.C. Chapter 27-10.**

[Doc ID# 131, ¶ 11].

[¶55] Conversely, it is now Marcy who seeks to “muddy the waters” by asserting for the first time on appeal that the good cause extension of the preliminary injunction was a remedial sanction of contempt and so should be overturned. Undeniably, this argument was never raised before the District Court. Thus, in order to bootstrap the extension of the preliminary injunction to her appeal, Marcy must mischaracterize the extension as a remedial sanction. This Court should not rise to the bait. Because Marcy failed to present this argument to the District Court, she is precluded from first raising it on appeal.

#### **B. The Good Cause Extension Was Not A Remedial Sanction**

[¶56] Despite her prior admission that the legal authority for a good cause extension to a preliminary injunction derives from N.D. R. Civ. P. 65, not N.D. Cent. Code § 27-10, Marcy now argues the opposite on appeal. Marcy’s statement that “[b]ecause of the lower court’s declaration that Marcy was in contempt of the court, the lower court restrained and enjoined her from acting in any way as a [sic] officer or director on behalf of the Companies – companies in [sic] owned by both Marcy and Steven – *without any methodology to purge the declared contempt*” is factually incorrect at best and intentionally deceiving at worst. Appellant’s Br. at ¶ 21.

[¶57] A cursory review of the transcript of the June 28, 2017 hearing reveals this assertion is contrary to the Corporations' request for relief and the District Court's oral and written findings, respectively, to wit:

12 and so **I'm not going to ask for a sanction**  
13 **for contempt or a remedial sanction in order to purge**  
14 **the contempt.** [ . . . ]  
3 **what I ask the Court to do is find**  
4 **Ms. Orwig in contempt and cite that as the good cause**  
5 **necessary to continue the injunction.** [ . . . ]  
10 Ms. Orwig, the Court had a more severe remedial  
11 sanction in mind, but listening to the attorneys, I  
12 will adopt what's been suggested. **I do find the fact**  
13 **that you have not returned those items is certainly**  
14 **evidence of good cause for the Court to continue the**  
15 **injunctive order that's in place, and that will be the**  
16 **order of the Court.**

Appellees' A. 23, 26.

[¶58] Marcy's assertion on appeal lacks foundation not only in fact, but in legal authority. Marcy concedes, as she must, the legal authority to extend a preliminary injunction for good cause derives from N.D. R. Civ. P. 65; not N.D. Cent. Code Chapter 27-10. Further, Marcy fails to cite to any portion of the record to support her assertions. To be sure, bare statements of Counsel are not evidence. Mehl v. Mehl, 545 N.W.2d 777, 780 (N.D. 1996). For the foregoing reasons, any challenge to the good cause extension to the preliminary injunction must be denied.

**C. The District Court Had Subject Matter Jurisdiction To Appoint A Receiver**

[¶59] Likewise, the Corporations sought and received the appointment of a receiver over the parties' Arizona property in the event the Corporations were able



to arrange financing to purchase it on Marcy and Steve's behalves. Marcy's challenge of the District Court's jurisdiction to appoint a receiver to facilitate the sale of the Arizona property merits little discussion. The appointment of a receiver is provided for by N.D. R. Civ. P. 66, and N.D. Cent. Code Chapter 32-10, not N.D. Cent. Code Chapter 27-10. Once a Court has personal jurisdiction over the parties, it has the ability to adjudicate the "incidences" of the parties' marriage, such as the division of their property. See Smith v. Smith, 459 N.W.2d 785, 787-89 (N.D. 1990) see also Catlin v. Catlin, 494 N.W.2d 581, 588 (N.D. 1992).<sup>4</sup> Marcy's appeal from the November 13, 2017 appointment of a receiver should be denied.

[¶60] Finally, as this Court is well aware, an Appellee may attempt to save a favorable judgment by urging any ground asserted in the Trial Court. Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 26, n. 1, 643 N.W.2d 685. Before the District Court, the Corporations' requests for relief were made pursuant to N.D. R. Civ. P. 65 and 66, and N.D. Cent Code Chapter 32-10. Should the Court find the requested relief was instead granted as a result of the Contempt Orders, the record is replete with evidence by which the Court can affirm the District Court's Order, independent of the Contempt.

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<sup>4</sup> Marcy's argument also fails to recognize she entered into a stipulation in which "the parties expressly agree and stipulate to the fact that the District Court . . . has both *in personam* and subject matter jurisdiction over all of the issues arising in this action." Appellant's A. at 240.

## V. CONCLUSION

[¶61] The Corporations respectfully request the appeal from the July 31, 2017 and October 9, 2017 Orders be dismissed, or in the alternative, that the Orders affording relief to the Corporations be summarily affirmed.

Dated this 22<sup>nd</sup> day of May, 2018.

/s/ Ashley K. Champ

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